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No. 271

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1963

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AFL-CIO, AND ITS LOCAL 840, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD

and

PIASECKI AIRCRAFT CORPORATION

BRIEF IN REPLY TO NATIONAL LABOR RELATIONS BOARD'S BRIEF IN OPPOSITION

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Petitioners' primary purpose in filing this Brief in Reply in this matter is to call attention to the fact that the Board's counsel in this Court appears to have departed from the theory which was advanced by the Board's counsel in the lower court. Moreover, the Board's counsel in this Court also expresses the view that "the Act does not specify any particular procedure for determining compliance questions."

Thus clarification of such procedure and a determination as to whether the proceeding before the Board was a "con-

pliance" proceeding would be most helpful in the administration of the Act in that such matters are presently unsettled and parties are uncertain of their rights. Under the present state of the law, not only are charging parties uncertain as to the procedure to be followed and the nature of the proceedings, but there appears to be variance of opinion between the Board's counsel.

The Board's counsel in this Court maintains that the instant proceeding before the Board is a compliance proceeding, in relation to which the Board may exercise unilaterally the same exclusive power as in a contempt proceeding instituted for failure to comply with a "court enforcement decree," i.e., the exclusive "power to evaluate the sufficiency of the compliance with a court decree." This theory stems from the proposition that the Board is enforcing a "public right," of which the charging parties have no concern and in respect to which they may exercise no rights or remedies.

The Board's counsel erroneously views the proceeding before the Board as a compliance proceeding and thus equates it with a contempt proceeding. The proceeding before the Board was neither a contempt proceeding nor a compliance proceeding, but the continuation of the second stage of an original proceeding instituted under Section 10 (c) of the Act, the purpose of which was to compute back pay and resolve reinstatement placement of discriminatees and other issues which were left unsettled by its initial order. Under the Board's counsel's theory, charging parties would have had no standing before the Board and thus no right of appeal under Section 10 (f), nor any other rights, all of which means that the charging parties are impotent to challenge or contest the Board's unilateral computation of back pay and reinstatment placement of discriminatees.

The Board's counsel in this Court cites no authority to support such position, but draws an inference from *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261. The Court in this case was careful to note the distinction between an appeal under Section 10 (f) and a contempt proceeding. The Court pointed out under 10 (f) that the charging party is "afforded opportunity to *contest* a final order." Section 10 (f) "seeks not to require compliance with the Board's order but to overturn it."

In the instant case, the charging parties seek to "contest" the Board's final action in respect to its computation of back pay, its placement of discriminatees, its treatment of the bargaining rights of the charging parties and its determination that no discriminatee shall be placed on a preferential hiring list. These findings are what the charging parties want overturned. For this purpose, charging parties requested a hearing for the right to contest is a futile gesture unless a forum is provided for such contest. It is clear that the matters which the charging parties desire to have overturned are not compliance matters but are matters which invoke the Board's original jurisdiction under Section 10 (c), the litigation of which is a continuation of the initial proceedings. *NLRB v. CCC Association*, 306 F. 2d 534 (CA-2); *NLRB v. New York Merchandising Co.*, 134 F. 2d 949, (CA-2).

As Justice Frankfurter pointed out in *NLRB v. Deena Artware*, 361 U.S. 398, 399, the present proceeding before the Board is the second stage of a two-stage proceeding. Justice Frankfurter further declared that at this stage of the proceeding, "The determination of the specific liabilities may involve *a protracted contest*" and is excluded from the first stage of the proceeding "in the interests of efficient administration of the Act." (Italics ours.)

In the instant case, charging parties were both unlaw-

fully deprived of the right to contest as described by Justice Frankfurter, and the right to contest the results of such contest under Section 10 (f).

Had the Board, as it sometimes does, litigated reinstatement rights in its initial hearing (See Philip Carey, 140 NLRB 90), or set the matter for hearing under Section 102.52, Board's Rules and Regulations, the charging parties would have been afforded a hearing with the right to appeal under 10 (f) in the event they were aggrieved by the Board's action which they were denied in the instant case.

Certainly expediency in the Board's procedures should not be the basis for denying charging parties what otherwise would be their rights. Indeed if the Board may deny a hearing to the charging parties in the second stage of the same proceeding, it would follow that it may deny a hearing to charging parties in the first stage. We find no authority to support such a proposition.

From the foregoing, if is clear that charging parties should not have been denied a hearing and a subsequent appeal under Section 10 (f), if necessary, on the ground that the proceeding before the Board was a compliance proceeding and the Board thus possessed "exclusive power to determine" unilaterally all matters which were before the Board in this second stage of the initial proceeding.

The Board's counsel in the lower court did not take such an extreme position. Such counsel argued that since the order of the Board concerns the administrative handling of the case subsequent to the entry of decree and does not involve any unfair labor practice findings or order, the order is not a final order within the meaning of Section 10 (f) and "an original action of review under that section may not be predicated thereon."

However, Board's counsel did concede that "The Board

nevertheless acknowledges that this court has jurisdiction to entertain the union's petition * * *"

Pursuant to this theory, no doubt, Board's counsel filed in the lower court a Motion to Dismiss the Petition for Review and Treat It as a Petition for A Writ of Mandamus[1] and Other Relief Ancillary to Case No. 12,912. The lower court did not specifically pass upon this Motion or the charging parties' Motion in the alternative requesting the lower court to set the matter for hearing in the event the Board's motion were granted. The action in mandamus envisioned compelling the Board to institute an action for contempt against Piasecki on the ground that it had not complied with the decree. It is obvious that such an action would fail since the contempt action against Piasecki would not lie until the back pay was liquidated by the Board and reinstatement-placement of discriminatees declared. *NLRB v. Deena Artware*, 361 U.S. 398, 400; 202 F. 2d 798, 802 and 261 F. 2d 503, 508 (CA-6). Obviously mandamus will not lie to force the Board to seek a remedy to which it was not entitled. Moreover, if discretion were involved, as Board's counsel maintained, mandamus would not lie. *Panama Canal v. Grace Line, Inc.*, 356 U.S. 309, 318. Mandamus is restricted to "situations where ministerial duties of a non-discretionary nature" are involved. In *NLRB v. New York Merchandising Co., supra*, 952, the Court said: "We can not delegate to the Board power to fill in the amount of back pay as a merely ministerial duty."

Thus the theory of the Board's counsel in the Court below

[1] Board's counsel stated in its Reply Brief, page 2, "Since the Court already has jurisdiction over this case as a result of the prior review and enforcement proceedings, the union's request for an affirmative order against the Board may appropriately be treated by the Court as an application for mandamus."

that the appeal was a proceeding in mandamus[2] likewise must fail, and the proceeding before the Board must be viewed as one subject to review under Section 10 (f); thus the charging parties were entitled to a hearing before the Board. If the Court below adopted the theory of Board's counsel, the Court is in conflict with the foregoing cited cases since the action before the Board was not one sounding in mandamus or contempt, but it was the second stage of an original proceeding under Section 10 (c). It was not ancillary to the enforcement proceedings in cause 12,912 but was the second stage of the original proceeding in Case No. 4-CA-1496 before the Board. In *NLRB* v. *New York Merchandising Co., supra*, the Court said such a proceedings is not "part of a proceeding for contempt."

The manner in which the lower court exercised jurisdiction is not clear except that it treated the charging parties' appeal erroneously as "ancillary" to cause 12,912. Whether this means that the Court was treating the charging parties' appeal as one in mandamus or as an appeal under 10 (f), is not specifically detailed by the Court. The Court satisfied its affirmance of the Board's order with several observations which are neither supported by the facts in the record nor was any competent evidence presented in the lower court to sustain such observations.

The Court held that the settlement agreement was in "substantial accord" with its order. The Board used the words "substantial compliance." Whether the Court's choice of "accord" instead of "compliance" indicated that it believed that the proceeding was not a compliance proceeding is also unclear.

In any event, neither the Board nor the Court set forth

[2] Board's counsel in this Court did not mention the word mandamus at all in the argument; nor did the lower court mention mandamus in its opinion.

facts upon which its findings of substantial "compliance" or "accord" can be sustained. In fact, comparison of the settlement with the decree results in an opposite conclusion. Certainly "substantial" compliance or accord is not effected:

1. When only 8 out of 133 discriminatees are reinstated;
2. When for five years of potential unemployment, these 133 discriminatees received the sum of $151,000 as back pay, although estimated back pay was as high as as $500,000;
3. When the back pay paid to the discriminatees who lost employment for almost five years, based on a rate of $40.00 a week, does not exceed a year's pay for all employees;
4. When Jas received no back pay at all, although the original order of the Board found that Piasecki had hired "between 155 and 175 production employees at the New Castle Plant," more than the total number of discriminatees, 123 NLRB 348, 349;
5. When the union was denied its rights of representation without reasons;
6. And when the discriminatees were denied their preferential hiring rights.

Indeed, under these facts, it would appear that there was most unsubstantial compliance with the decree.[2] Had the

[2] The extreme variance between the entered order and the decree was tantamount to a modification or change in the decree which neither the Board nor the Court had power to effect without a subsequent hearing by the Board for such purpose. *Wallace Corp. v. NLRB*, 159 F. 2d 952, 956 (CA 4): "* * * action by the Board is a prerequisite to any modification or change of the decree on such grounds [whether substantially

charging parties been granted a hearing, facts would have been developed which would have shown, for example, that there was a greater amount of back pay due, for by its answer, the Board itself admitted that there was more back pay due than paid discriminatees since it averred that "the resultant figures were used as an estimate of back pay and as a basis for negotiations and eventual pro-rata of the gross back pay settlement." If total back pay were computed, it is obvious that the total amount was not paid to the discriminatees. Moreover, while at least 155 employees were hired at the Piasecki New Castle Plant, more than all of the discriminatees, 14 who had no income received no back pay. There can be no doubt that had this matter been litigated before the Board, a larger back pay to discriminatees would have resulted.

Nor are there findings before the Board, or before the Court, which support an acceptance of less than the full amount of back pay. In fact, the Board violated the teachings of this Court when it failed to "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress had empowered it." *Phelps-Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197.

Thus it is obvious that the result would have been different had the case been heard before the Board. The assertions of the Board's counsel and the Board's answer filed in the lower court are the Board's counsel's *post hoc* rationalizations of the Board's unlawful action.

In the case of *Burlington Truck Line, Inc.* v. *United States*, 83 S. Ct. 239, 246, the Court said:

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equivalent positions remained after the abolishment of a department." Both the Board and the Court were in error in effecting a modification of the enforced order without a hearing upon the pretense of "substantial" compliance with the order. *Federal Home Loan Bank of San Francisco* v. *Hall*, 225 F. 2d 349, Footnote 10, page 372 (CA-9).

"The courts may not accept appellate counsels' *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself:

> '[A] simple but fundamental rule of administrative law * * * is * * * that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action * * *" (Ibid)

For the courts to substitute their or counsel's discretion for that of the commission is incompatible with the orderly functioning of the process of judicial review."

The position of the Board as espoused in the lower court and in this Court and the lower court's action run afoul of the teachings of this case.[4] An examination of the Board's answer indicates that the settlement was not based upon the Board's own independent investigations and findings, but upon unsupported, self-serving declarations of Piasecki, which were not in accord with the Board's administrative findings of fact. For example, the Regional Office had found that the New Castle and Philadelphia plants were "a common undertaking" and "for the purposes of compliance, the New Castle and Philadelphia plants should be considered a single enterprise," that there was an inter-

[4] Indeed, the Board relied upon the recommendations of Board's General Counsel in adopting the settlement proposal.

change between employees of both plants and that "under the circumstances we interpret the New Castle plant in the decree to encompass the Philadelphia plant." (See letter of August 22, 1961, Exhibit 7 to Board's answer.)

At most the answer of the Board simply puts into issue certain claims of the Board for which no evidence was produced in the lower court. As noted in our brief, if the matters set forth in the Board's answer were pertinent for consideration in the lower court, the charging parties should have been given an opportunity to produce evidence in opposition to the assertions made by the Board, and the Board should have been required to substantiate its allegations by proof. (Rule 19, Rules for Court of Appeals, Third Circuit.)

As noted above, the lower court did not pass upon the charging parties' motion which was filed for such purpose. The upshot of the proceedings was that the charging parties were not only denied a hearing before the Board, but were denied a hearing in the lower court upon these factual matters which apparently the lower court considered in affirming the Board's order. Had the charging parties been afforded the right to a hearing in either case, there is no question that the result would have been different.

The need for determination of the questions involved herein by this Court seems more demanding in that there is a variance of opinion of the Board's counsel as to what rights charging parties may have in the second stage of the Board's original proceeding on unfair labor practices. The counsel for the Board in this Court asserts that the charging parties are without rights, which contemplates unbounded exclusive power with the Board; the Board's counsel in the lower court concedes that the charging parties have rights but these rights must be pursued in a mandamus action in the Appellate Court and not before the Board;

the Court below appears to take the position that the charging parties' rights are limited to the "opportunity to present (their) views"; the charging parties claim that they are entitled to a hearing before the Board and the right to a review under Section 10 (f) of the Act, if necessary.

The procedure and the rights of the charging parties should be established by this Court as an aid in the administration of the Act.

By not again referring to those matters in our brief which were passed over without mention by the Board's counsel in this Court, we do not mean to minimize their importance or persuasive power.

Thus we pray as in our petition.

Respectfully submitted,

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